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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut,
Petitioner,

against

ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, FRANKLIN C. LEWIS, ABRAHAM L. GUTMAN, Executors,
Respondents.

No. 964.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The pertinent facts are stated in the petition for the writ of certiorari and in the statement introducing the petitioner's brief.

Briefly, the decision of the Connecticut court, of which the petitioner makes complaint, is that the United States Liberty Bonds, treasury certificates and cash owned by the decedent at the time of his death were tangible personal

property; and that, as they were then physically located in the State of New York, the Connecticut statute which attempted to subject them to a succession tax was unconstitutional, under *Frick* v. *Pennsylvania*, 268 U. S. 473, as taking property without due process of law (R., 86-87).

POINT I.

Upon the only Federal question involved in this case the decision of the Connecticut court is clearly correct.

The petitioner has failed to state clearly the issue involved in determining whether this petition for certiorari should be allowed. The issue is not whether this court would have agreed with the Connecticut court on the tangible nature of the property and its taxability, but whether a Federal question was involved and was rightly decided.

There was a Federal question involved. Having decided that the bonds, treasury certificates and cash were tangible personal property (which was a local question), the Connecticut court had to decide whether they could be made subject to the succession tax attempted to be levied upon them by Chapter 190, Public Acts of Connecticut, 1923, consistently with the due process of law required by the Fourteenth Amendment to the Federal Constitution. This Federal question was rightly decided. Since the property held to be tangible was located outside the State of Connecticut at the time of the decedent's death, it came squarely within the rule laid down by this court in *Frick* v. *Pennsylvania*, 268 U. S. 473, and the Connecticut court so held. Hence, the determination of the sole Federal question involved rested squarely on the principles established by this court.

The decision of which the petitioner really makes complaint is that the bonds were tangible personal property to all intents and purposes. This part of the decision was necessarily precedent to the decision of the Federal question, but it was a question of purely local law to be decided by the State court.

We believe that its decision was entirely correct and that this court would have reached the same conclusion. The following cases treat such securities as the bonds and treasury certificates here involved as tangible personal property and are authority for the decision reached by the Connecticut court:

New Orleans v. *Stempel*, 175 U. S. 309, especially 321-323.
Wheeler v. *New York*, 233 U. S. 434, and cases cited p. 440.
Blackstone v. *Miller*, 188 U. S. 189, 206.
Foreign Held Bonds case, 15 Wall. 300.
Blain v. *Inby*, 25 Kan. 499.
McLaughlin v. *Cluff*, 240 Pac. (Utah) 161.

Whether this court would have reached the same conclusion or not, it seems to us that this was obviously a *question of purely local law to be decided finally by the State court.* It is clearly a part of the common law of the State and, we think, clearly of the same nature as those questions held to be local State questions, upon which the decision of the State court was final, in the following cases:

Orr v. *Gilman*, 183 U. S. 278.
Pennsylvania R. R. Co. v. *Hughes*, 191 U. S. 477, 486.
American Steel & Wire Co. v. *Speed*, 192 U. S. 500, 523.

Consolidated Turnpike v. *Norfolk etc. Ry. Co.*, 228 U. S. 596, 602.
Doyle v. *Atwell*, 261 U. S. 590.

If we understand correctly the principles on which this court takes jurisdiction, it will not examine into the correctness of the decision of the State court on a matter of local law, whether common law or statutory construction, if the State court has correctly decided the Federal question arising out of the decision on the local law. This is the implication of Rule 5, paragraph (a) of the present rules of this court and the principle has been laid down in a very long list of cases where the State and Federal questions have been separate and not dependent on each other, following *Murdock* v. *Memphis*, 20 Wall. 590.

The rule has again been laid down in a number of cases where a State question had first to be decided before the soundness of the constitutional point could be determined, which is the exact situation in the present case. Typical of these latter cases are the following:

Moffitt v. *Kelly*, 218 U. S. 400, 405-406.
Clement National Bank v. *Vermont*, 231 U. S. 120, 134.
Rogers v. *Hennepin County*, 240 U. S. 184.
Baltimore Traction Co. v. *Baltimore Belt R. R. Co.*, 151 U. S. 137.
Louisville etc. Ry. Co. v. *Mississippi*, 133 U. S. 587.

In each of these cases the State court passed upon a question of local law, just as in the present case the Connecticut court passed on the question of the nature of the bonds under Connecticut law. Taking such determination of the State law as final and conclusive, this court thereupon determined whether the Federal question arising out

of it had been correctly decided and whether any constitutional right of the party appealing had been violated.

This, we think, is precisely the course which should be followed in the present case, and that being so, it is apparent that under the principles of the *Frick* case above cited the decision of the Federal question was correct. The Federal question is one "concluded by previous decisions of this court" (the *Consolidated Turnpike* case, *supra*, at p. 600).

We submit, therefore, that since this application for a writ of certiorari is discretionary, it should not be granted where it is evident that the complaint of the petitioner arises not out of the determination of the Federal question, but out of the determination of the local State question.

POINT II.

The petitioner, having only an official and not a personal interest in the outcome of the appeal, has no standing to seek this writ of certiorari.

The petitioner frankly recognizes that this court has uniformly held that a State or local officer may not review the decision of a State court holding a State statute constitutional, where he seeks the review by virtue of his official interest and without any personal interest in the outcome. The petitioner himself cites the applicable cases on page 19 of his brief:

Smith v. *Indiana*, 191 U. S. 138.
Braxton County Court v. *West Virginia*, 208 U. S. 192.
Marshall v. *Dye*, 231 U. S. 250.
Stewart v. *Kansas City*, 239 U. S. 14.
Lampasas v. *Bell*, 180 U. S. 276.

He attempts to distinguish these cases from the present one on two grounds: (1) that here the State official is seeking to review the decision that the State statute is *unconstitutional*, and (2) that the statute passed by the State legislature just prior to his application for a writ (printed at the end of petitioner's brief), authorizing and directing him on behalf of the State to petition for this writ, gives him a standing which he might not otherwise have possessed. We submit that neither ground of distinction is tenable.

The basis of the rule which the petitioner tries to avoid is consistently stated to be that "the interest [of the complaining party] must be of a personal and not of an official nature" (the *Braxton* case, *supra*). He is required to have "a personal as distinguished from an official interest in the relief sought and in the Federal right alleged to be denied by the judgment of the State court" (the *Marshall* case, *supra*).

This rule is said to spring from another rule more frequently invoked, that a party cannot appear as appellant before this court on behalf of third persons and not of himself (*Smith* v. *Indiana, supra*).

It so happens that the cases decided by this court on the immediate point are cases where the decision of the State court *upheld* the constitutionality of the State statute at issue, but that is, we think, purely a coincidence arising in part from the fact that the great majority of State court decisions involving Federal constitutional points uphold the constitutionality of the State statute. Certainly there is not the slightest suggestion in the cases cited that the rule would be otherwise if the decision had been against the constitutionality of the statute, nor would such a distinction be reasonable, for the interest of the petitioner is no more personal, no less official, no less an attempt to present and establish the rights of third persons

when the State court finds the State statute unconstitutional than when it holds it constitutional.

Turning to the petitioner's second point, we cannot see how the statute adopted by the Connecticut legislature and approved February 23, 1927, two months and a half after the decision complained of, can give added force to the Tax Commissioner's petition. As in *Marshall* v. *Dye, supra*, this case presents a difference between the executive and legislative branches of the State government on the one hand, and the judicial branch on the other, relating entirely to State legislation. In the *Marshall* case the legislature had determined to submit a new constitution to the vote of the people of the State, but a citizen sought and secured from the State courts an injunction prohibiting the State Board of Elections, a branch of the executive department, from making such a submission. Thereupon the Board, with the governor as its head, sought to invoke the power of this court to uphold the position of the legislative and executive departments desiring to submit the projected constitution to the vote as against the decision of the judicial branch that it might not be so submitted. This court refused jurisdiction.

The situation in this case up to the passage of the Act of February 23, 1927, seems identical. The Connecticut legislature, by Chapter 190, Public Acts of 1923, the statute in question, purported in Section 1 to tax "all property, and any interest therein, owned by a resident of this State at the time of decease" (Petition, p. 4). At no point in this case has it been disputed that the legislature thereby intended, if possible, to tax the property concerned in this application. The executive, through the Tax Commissioner, sought to enforce the legislative intent. The judicial branch decided that it might not be done.

What new element does the Act of February 23, 1927, introduce? The legislature declares that by the judgment Chapter 190 has been held unconstitutional as to certain classes of property, that the question involved of the State's right and power to impose such taxes is fundamental, that the situation creates an emergency and that the Tax Commissioner is empowered and directed "in his name and in behalf of the State" to petition for this writ. What is this more than a statement that the legislature still adheres to the policy which it already expressed very definitely in 1923 that the property here involved should be subject to the succession tax attempted to be levied? The later act is purely a restatement of the same position which the legislature took in 1923. But if the judicial branch had authority to overrule the legislative and executive branches initially, the legislative branch cannot by a repetition improve its own standing or that of the Tax Commissioner.

Secondly, the recent act directs the Tax Commissioner to take the proceeding "in his name and in behalf of the State." The Tax Commissioner has no more of a personal interest now than he had before the act was passed. He is still an official and appears here as an official only and the act simply emphasizes his official capacity by its language.

No attempt is made by the statute to substitute the State as a party in place of the Tax Commissioner. Whether such substitution could be had is therefore not in question, and we do not argue the point. The statute, however, gives no color to any argument that the State is now a party, and it seems indisputable that despite the statute the Tax Commissioner is seeking the review on behalf of someone else and not because of his own personal interest. His petition, therefore, comes squarely within the rule of the cases cited at the beginning of this point.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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